FILED
United States Court of Appeals
Tenth Circuit

August 8, 2012

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY JOHN VANDERWERFF,

Defendant-Appellant.

No. 12-1280
(D.C. No. 1:12-CR-00069-JLK-1)
(D. Colo.)

ORDER

Before **BRISCOE**, Chief Judge, **KELLY** and **MURPHY**, Circuit Judges.

Timothy John Vanderwerff filed a notice of appeal seeking to bring an interlocutory appeal from the district court's order rejecting his plea agreement. We directed Mr. Vanderwerff to show cause why his appeal should not be dismissed for lack of jurisdiction. After considering his response, we conclude that this appeal must be dismissed for lack of jurisdiction.

Our jurisdiction under 28 U.S.C. § 1291 is limited to "final decisions of the district courts." In *United States v. Carrigan*, 778 F.2d 1454, 1464 (10th Cir. 1985), we considered "whether 28 U.S.C. § 1291 permits an appeal of a district court's pretrial order rejecting a proposed plea bargain agreement." In *Carrigan*, the government argued that the collateral order doctrine announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), permitted such an appeal.

Carrigan, 778 F.2d at 1464. That doctrine allows for an interlocutory appeal from a limited class of collateral orders, but the order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from final judgment." *Id*. (internal quotation marks omitted). We disagreed with the government's position, holding "that neither a defendant nor the Government may appeal a preconviction order of the district court denying a proposed plea bargain agreement." *Id*. at 1466.

In the show cause order, we directed Mr. Vanderwerff to explain why his appeal should not be dismissed under this court's holding in *Carrigan*. In response, Mr. Vanderwerff argued that *Carrigan* is distinguishable because it arose from "circumstances starkly different from [his] case" and therefore "[i]t does not bar application of the collateral-order doctrine" to his appeal. Resp. at 1. We disagree.

Carrigan's holding was not narrowly tailored to the underlying circumstances involved in the district court's rejection of the plea agreement in that case. Instead, *Carrigan* resolved the broader jurisdictional question of whether the collateral order doctrine could permit an interlocutory appeal from a pretrial order rejecting a plea agreement. 778 F.2d at 1464-66. In answering that question in the negative, we explained, in part, that "a defendant has no right to have a plea bargain accepted" and therefore "[t]he rejection of a plea bargain . . . does not involve an important right which would be lost, probably irreparably, if review had to await final judgment." *Id*. at 1465 (internal quotation marks omitted).

Defendant asserts that his case is distinguishable from *Carrigan* because "he will be compelled to prosecute [his] direct appeal from inside a prison cell" and if he prevails on his direct appeal and is resentenced under the original plea bargain he may end up being resentenced to a probation-only sentence after having already served time in prison. Resp. at 6. He contends that "by waiting for his direct appeal to vindicate his wrongly rejected plea bargain, [he] will have forfeited an essential virtue of the plea." *Id*. But this argument fails to show that the district court's rejection of his plea agreement is a matter that is "effectively unreviewable on appeal from a final judgment." *Carrigan*, 778 F.2d at 1464 (internal quotation marks omitted). And he will not be the first defendant to have to pursue an appeal of an order rejecting a plea agreement from a prison cell. *See United States v. Robertson*, 45 F.3d 1423, 1433-34 (10th Cir. 1995) (appealing order rejecting plea agreement after being found guilty at trial and sentenced to prison).

Moreover, the Supreme Court has instructed that "[a]ppeal rights cannot depend on the facts of a particular case." *United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978) (internal quotation marks omitted). In *MacDonald*, the defendant sought to appeal a pretrial order denying his motion to dismiss based on speedy trial violations. The Fourth Circuit recognized that the denial of a pretrial motion in a criminal case was generally not appealable and not every speedy trial claim merits an interlocutory appeal, but stated that "it was the extraordinary nature of MacDonald's case that persuaded [the court] to allow an interlocutory appeal." *Id*. at 853 (internal

quotation marks omitted). The Supreme Court rejected this rationale, explaining that "[t]he factual circumstances that underlie a speedy trial claim, however, 'extraordinary,' cannot establish its independent appealability prior to trial." *Id*. at 857 n.6.

At the end of his response, Mr. Vanderwerff asks that the court "consider this matter in the alternative as a petition for mandamus." Resp. at 6. In *Carrigan*, we also considered mandamus as a possible alternative form of relief. 778 F.2d at 1466. To be entitled to mandamus, a party "must have no other adequate means to attain the desired relief and must show that his right to the writ is clear and indisputable." *Id*. We concluded that the district court's rejection of the plea agreement in *Carrigan* did not justify issuance of the writ because "[a] defendant . . . may seek review of such an order on direct appeal after a final judgment of conviction and sentencing" and "[t]herefore it cannot be said that the parties have no adequate means to seek the desired relief." *Id*. at 1467. The same analysis holds true here. Because Mr. Vanderwerff can appeal the district court's order after final judgment, he has not established his entitlement to mandamus relief.

Our decision in *Carrigan* compels us to DISMISS this appeal for lack of jurisdiction and DENY the request for mandamus relief.

Entered for the Court
Per Curiam